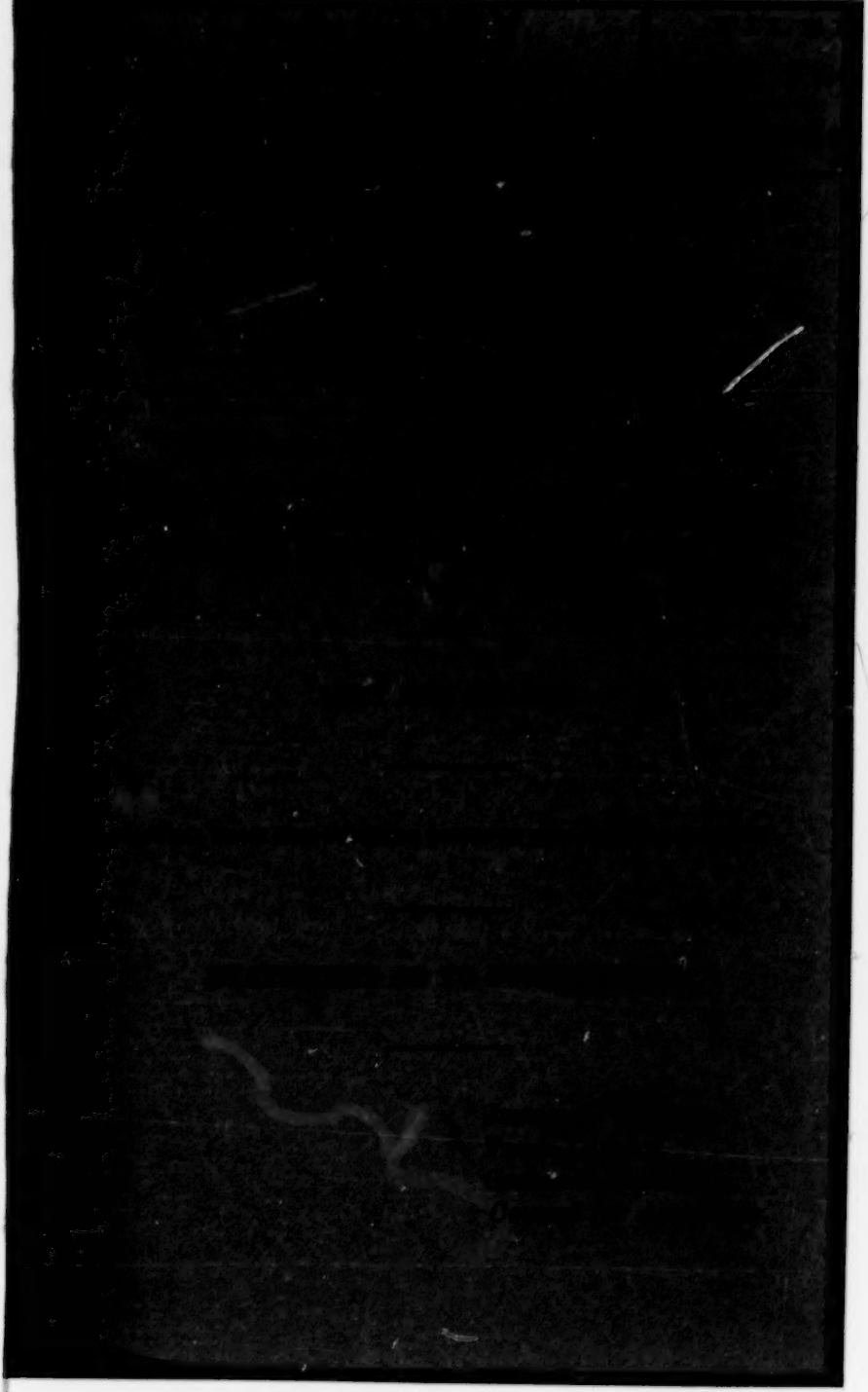

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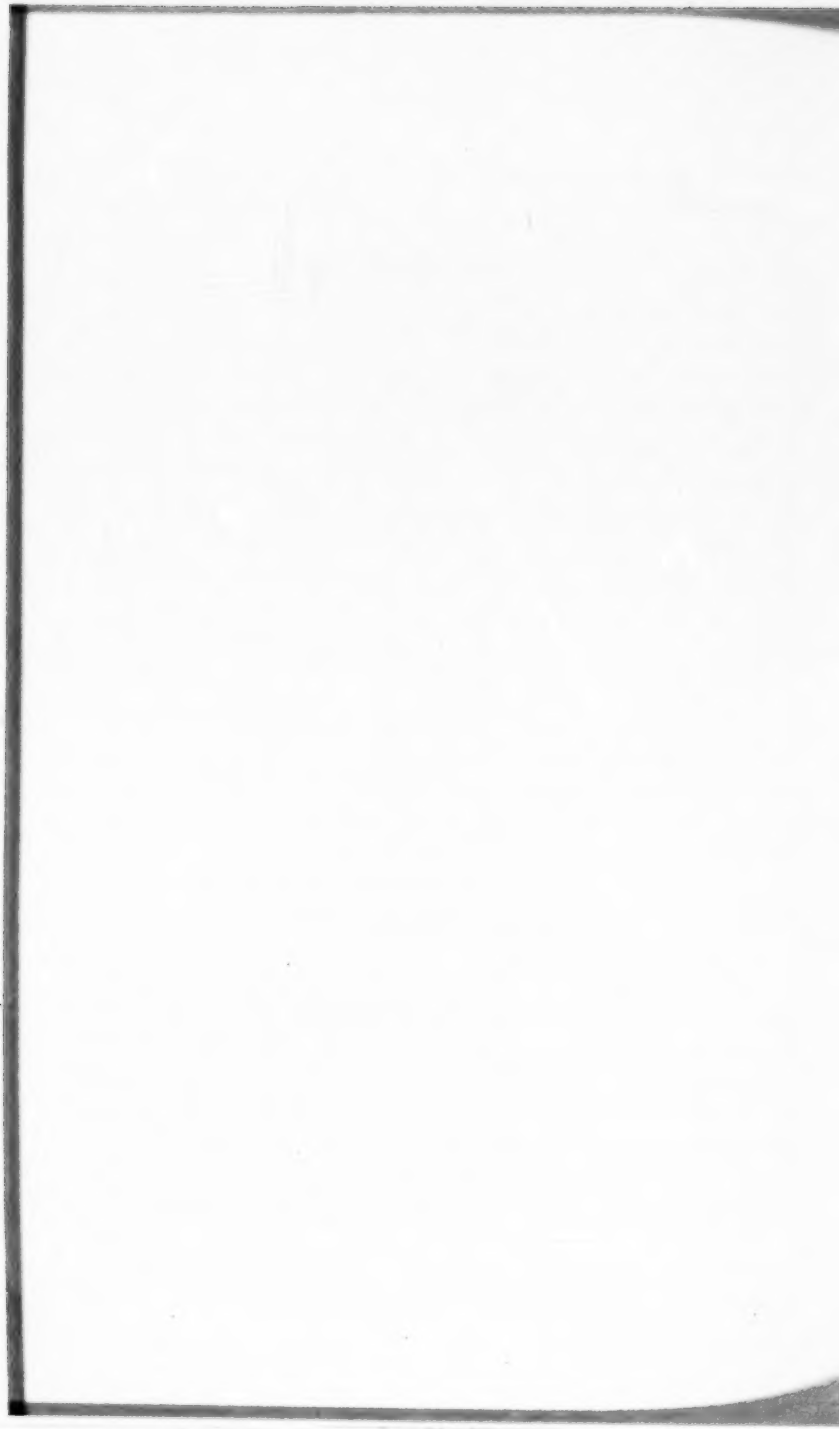

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 472

BETTY STODDARD HORN, BARBARA STODDARD KIRKLAND, LOUIS E. STODDARD, JR.; AND ETHEL S. GARRETT AND THE UNION TRUST COMPANY OF PITTSBURGH, AS CO-EXECUTORS AND CO-TRUSTEES UNDER THE LAST WILL & TESTAMENT OF HARRY DARLINGTON, JR., DECEASED,

vs. *Appellants,*

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Appellee*

JURISDICTIONAL STATEMENT UNDER SUPREME COURT RULE 12

Pursuant to Rule 12 of the rules of the Supreme Court of the United States, appellants present the following statement showing the basis upon which they contend that the Supreme Court has jurisdiction to review on appeal the judgment of the Supreme Court of Illinois, appealed from herein, as follows:

Statutory Provisions Believed to Sustain Jurisdiction

The following provision of Section 1257 of the United States Code (U. S. C. Title 28), is relied upon as giving

jurisdiction to the United States Supreme Court to review the decision of the Supreme Court of Illinois:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The highest court of the State of Illinois has, in affirming the Circuit Court of Cook County and thereby holding that plaintiff's claim was barred by Section 15 of the Illinois Statute of Limitations, decided in favor of the validity of said statute, as applied to the instant case, and of Sections 2 and 13 of Article II of the Illinois Constitution and has thereby denied plaintiff's contention that such provisions, as construed by the Illinois courts, are repugnant to the Fourteenth Amendment to the United States Constitution. Section 15 of the said Statute of Limitations (1947 Ill. Bar Statutes Chap. 83, Sec. 15, Par. 16) is as follows:

> "15. Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Sections 2 and 13 of Article II of the Illinois Constitution provide as follows:

> "2. No person shall be deprived of life, liberty or property, without due process of law.
>
> "13. Private property shall not be taken or damaged for public use without just compensation. Such com-

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pensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. • • •"
(1947 Ill. Bar Stats. p. 20.)

Nature of Case

This is an action by plaintiffs (appellants) for damages arising out of the construction of the Wabash Avenue viaduct in Chicago. Plaintiffs contended that the construction of said improvement constituted a taking and damaging of their property without payment of just compensation, and without due process of law, contrary to the provisions of our Federal and State constitutions.

The Nature of the Pleadings

Plaintiffs filed their complaint and an amendment thereto. The defendant filed its motion to dismiss, interposing the five year Statute of Limitations, supported by affidavits, alleging that the work was completed in 1931 whereas the suit was started in 1938, over five years after the cause of action arose. The plaintiffs filed six objections to the motion (Rec. 4; pp. 8-10) contending that the application of the five year statute would violate plaintiffs' constitutional rights under the State and Federal constitutions.

The Leading Facts

All facts well pleaded in the complaint stand admitted by the motion to dismiss, for the purposes of that motion. The facts are substantially as follows: The plaintiffs were, in the years 1930 and 1931, during the time of the construction complained of, the owners of the premises at the North East Corner of East Illinois Street and North Wabash Avenue, Chicago (Rec. 4; p. 1), consisting of a tract of land with a frontage of 100 feet on East Illinois Street, 100 feet on North Wabash Avenue and 100 feet on the alley to the North of the premises (Rec. 4; p. 2). To the East, the premises

adjoined other privately owned property. Prior to the Wabash Avenue viaduct construction, the streets and alleys were all level and at grade (Rec. 4; p. 2). The premises in question were improved with six 2-story and basement stone front, brick residences, fronting on Wabash Avenue and having a depth of about 50 feet, which buildings were built and adapted to the then established grades of the streets and alley (Rec. 4; p. 2), making ingress and egress easy and convenient.

The plaintiffs owned the fee to the center of Illinois Street, Wabash Avenue and the alley adjacent to their premises (Rec. 4; p. 3). On July 29, 1930, the City enacted an ordinance (Rec. 4; p. 3) which provided for depressing Illinois Street which adjoined plaintiffs' property on the South about 8¼ feet to permit it to pass under the Wabash Avenue viaduct and provided for a concrete retaining wall at the curb line. Wabash Avenue was elevated at the North line of Illinois Street approximately 7.85 feet, which necessitated a concrete retaining wall along the west line of the property in question about 8 feet high plus superstructures at the Southerly end and 3 feet high at the Northerly end (Rec. 4; pp. 4, 5). The retaining walls separated the property from its sub-sidewalk space and filled in the sub-sidewalk space (Rec. 4; p. 5). It also necessitated a change of grade in the alley adjoining plaintiffs' property on the North, to meet the new grade of Wabash Avenue (Rec. 4; p. 5). The property was substantially destroyed.

The trial court entered its order on April 27, 1948 (Rec. 4; p. 11), finding: "That there has been no physical taking of any of plaintiffs' tangible property for a public use;" and "That the cause of action herein is for the recovery of consequential damages and is therefore barred under the provisions of Section 15 of the Statute of Limitations of this state, * * *.", also

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"(3) That the application of said Section 15 of the Statute of Limitations to the action herein does not violate the provisions of Section 13 of Article II of the Illinois Constitution, providing that private property shall not be taken or damaged for public use without the payment of just compensation and does not deprive plaintiffs herein of due process of law, as guaranteed under Section 2, Article II of the Illinois Constitution or the *first section of the fourteenth amendment to the United States Constitution.*" (Italics ours.)

The cause was ordered dismissed at plaintiffs' costs.

Date of Judgment Sought to Be Reviewed

The Supreme Court of Illinois issued its original opinion and judgment affirming the trial court on the 19th day of May, 1949. A Petition for Rehearing was duly filed in accordance with Illinois Statutes and Rules, which petition was denied on the 20th day of September, 1949, making the decision of the highest court of appeals in the State of Illinois final.

Law and Argument on Jurisdiction

Wherever there is a *taking* of private property, it is universally held that the general Statute of Limitations does not apply and that its application would be unconstitutional. The Supreme Court of Illinois however, found that there was no taking, saying (Rec. 11, 12):

> "The test applied by this court and also by the federal court in determining whether real estate has been taken for public use within the meaning of our constitution is whether there has been an actual physical invasion of the tangible property."

Thus it has (erroneously) construed the decisions of the federal courts, as holding that there must be a physical

invasion of tangible property, to constitute a taking of property under the Fourteenth Amendment to the United States Constitution. This presents the question for this court to determine as to whether there has been a taking of appellants' property within the meaning of the federal constitution.

Appellants urge that the finding of the Illinois Supreme Court is wholly without support or merit, and that upon such erroneous premise, it was led into error in deciding the case and in denying that the Fourteenth Amendment to the United States Constitution was violated.

In appellants' Petition for Rehearing, they stated as follows (Rec. 20; p. 2):

> "The court has misapprehended the law in stating that the test as to a taking 'is whether there has been an actual physical invasion of tangible property,' and has misapprehended the Federal case and the Illinois cases cited in its opinion in support of that statement. Neither the Federal nor the Illinois cases justify that premise."

ILLINOIS COURTS AND COURTS OF ALL OTHER STATES UNIVERSALLY HOLD THAT EASEMENTS ARE PROPERTY AND THAT THEIR DESTRUCTION CONSTITUTES A TAKING OF PROPERTY

In the case of *People* v. *Smith,* 374 Ill. 286, the Illinois Supreme Court, in discussing the constitutional right of a land owner to damages in a change of grade case, says (p. 288):

> "This is a vested property right."

Private property is defined in *City of Belleville* v. *Turnpike,* 234 Ill. 428 (p. 434):

> "Whether the interest of appellant is denominated a franchise or an easement, it is a valuable property right, and its practical destruction would be the taking

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> of property within the constitution. • • • *Private property* forbidden by the constitution to be taken or damaged for public use without just compensation *is not limited to the tangible subject* matter or corpus of the property, but includes the right of user and enjoyment of it." (Italics ours.)

In the case of *Ferguson Coal* v. *Thompson,* 343 Ill. 20, the court says (p. 28):

> "Owners of property bordering upon a street have, as an incident of their ownership, the right of access by way of the streets which cannot be taken away or materially impaired without compensation."

Likewise, in the recent case of *Lydy* v. *City,* 356 Ill. 230, the court says (p. 240):

> "The right of a property owner to access to the public streets adjoining his property is a valuable property right, which cannot be taken away without just compensation."

In the case of *Penn Mutual Life* v. *Heiss,* 141 Ill. 35, the court says (p. 61):

> "If a railroad company by building its road upon the street fronting upon a lot, reduces the value thereof from $5,000 to $3,000, it has as certainly taken from the owner $2,000 of his property as if it had occupied a strip of his land of that value,—and this seems to be the current of later authority."

In the case of *Swedish Church* v. *Jackson,* 229 Ill. 506, the court says, with reference to an easement in connection with streets and alleys (p. 511):

> "The easement which was appurtenant to each lot by reason of the existence of the plat and the sales with reference to it, was private property."

In the case of *Aldis* v. *Union Elevated*, 203 Ill. 567, the court says, in its denial for petition for rehearing (p. 574):

> "At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained, as appurtenant to said property, the right of access to said streets, the right to enjoy the air and light which pass over said streets, the view and the comfortable and safe enjoyment of their property; (Field *v.* Barling, 149 Ill. 556; Doane *v.* Chicago City Railway Co., 160 id. 22; Kotz *v.* Illinois Central Railroad Co., 188 id. 578)."

In the case of *Central Trust Co.* v. *Hennen*, 90 Fed. 593, the owner of property had access to a certain highway which the public authorities discontinued. None of the real estate was invaded. The court said (p. 597):

> "Again, assuming that this right of way or easement was vested in the petitioner as claimed, we concur with the learned circuit judge in the opinion that a direct, permanent injury to, or the destruction of, such right of ingress and egress, would, to the extent of the damage actually sustained, be the taking of private property, for public use."

In the case of *Stock* v. *Cox*, 125 Conn. 405, 6 A. 2d, 346, the court says (p. 419):

> "This destruction of the plaintiff's right of access to his south tract constitutes a taking of it in the constitutional sense."

In *Gustafsen* v. *Hamm*, 56 Minn. 334, the court says (p. 339):

> "It is the settled doctrine of this court that the owner of a lot abutting on a public street, has, as appurtenant to the lot, and independently of the ownership of the fee in the street, an easement in the street, to its full

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> width, in front of his lot, for the purposes of access, light and air, which constitutes property."

In *Breinig* v. *Allegheny County*, 332 Pa. 474, the court said (p. 480):

> "Where land is taken or purchased for highways, the abutting owner retains * * * the right of access. * * * This right cannot be taken from him *unless compensation is made therefor under the law. It is a property right, protected by the Constitution.*
>
> "* * * these propositions are clear: * * * a municipality cannot, without condemnation, completely shut off an abutting owner's access to his land * * *." (Italics ours.)

In *Begilors* v. *Ballerino*, 111 Cal. 559, the court says (p. 563):

> "The owner of property abutting on a public street, has an easement in the street—which easement is his property."

And in *Heinrich* v. *St. Louis*, 125 Mo. 424, on page 428, the court says:

> "This right of access is appurtenant to his lot and is private property."

THE SAME RULE HAS BEEN ADHERED TO BY THIS COURT

This court has repeatedly held that the term "property", as used in the Constitution, is used in its broad sense and includes both tangibles and intangibles. There is no justification for reading into the 14th Amendment to the United States Constitution, the modifying adjective "tangible" before the word "property". In doing this, the Supreme Court of Illinois has violated cardinal rules of construction and long established principles of law and has violated recognized standard definitions of "property" and "taking".

This court, in the case of *Muhlker* v. *N. Y. Ry.*, 197 U. S. 544, in referring to identical easements as here involved, said (p. 568):

> "That such easement was an interest in real estate and constituted property within the meaning of the constitution of the state and could not be taken for public use without payment of compensation."

The court goes on and quotes with approval from Lewis on Eminent Domain (p. 571):

> "The true relation and subordination of these rights, public and private, is expressed, not only in the *Elevated Railroad Cases*, but by other cases. They are collected in 1 Lewis, Eminent Domain, 91 e, and, it is there said, 'established beyond question the existence of these rights, or easements, of light, air, and access as appurtenant to abutting lots, and that they are as much property as the lots themselves.' "

The meaning of "property" and "taken" has been frequently discussed by this and other federal courts, in connection with the provisions of the United States Constitution. A recent case, which discusses at length the meaning of the words "property" and "taken", is that of *U. S.* v. *General Motors*, 323 U. S. 373. The General Motors had a leasehold on a warehouse which the United States sought to condemn for military purposes. The General Motors sought to recover the cost of removal of the contents of the seized property as part of its damages. The lower court sustained an objection to such evidence on the ground that there was no "taking" as far as the expense of removal was concerned. This court held (pp. 377, 378):

> "The critical terms are 'property', 'taken' and 'just compensation'. • • • The Constitutional provision is addressed to every sort of interest the citizen may possess."

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The court then discusses the meaning of the word "taken", saying (p. 378):

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."

Other cases decided by this court likewise refute the Illinois Supreme Court's statement that the federal courts have ruled that there must be a physical invasion of tangible property to constitute a taking. In the case of *United States* v. *Welch*, 217 U. S. 333, the United States condemned land over which the property owner had a private right of way, which was the only practical outlet from his farm to the county road. There was no tangible property physically invaded. This court, by Justice Holmes, held (p. 339):

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay but if it were only destroyed and ended a destruction for public purposes may as well be a taking as would be an appropriation for the same end."

In the case of *Panhandle Pipe Line* v. *State Highway Com.*, 294 U. S. 613, this court said (p. 618):

> "A private right of way is an easement and is land."

Appellants' access or right of way to the streets in the instant case was likewise such an easement and was "land".

In view of these cases, including the former decisions

of the Illinois Supreme Court, and of these universally accepted principles and definitions, it is difficult to understand how the Supreme Court of Illinois could make such a finding, namely, that to constitute a taking, there must be a physical invasion of tangible property. *That decision is not in conformity with the applicable law of Illinois or the United States.*

The Constitutions of Illinois and the United States expressly prohibit the taking of private property without just compensation and without due process of law. This is a *prohibition* against the State and all of its agencies (*C. B. & Q. Ry.* v. *Chicago,* 166 U. S. 226). It does not require any action by the injured party but, on the contrary, prohibits the state (and its agencies) from doing anything which would constitute the taking of private property, without just compensation. Thus, it devolves upon the condemning party to initiate proceedings where the property is so taken and when it fails in this duty and thereby compels the property owner to sue, then the sustaining of a short limitation period deprives such property owner of due process of law under the state constitution and the 14th Amendment to the federal constitution. There was no point at which the limitation statute could start to run against the appellants, because it was the City's duty to initiate proceedings under the state and federal constitutions and appellants were deprived of the benefit of judicial proceedings to establish compensation or, in other words, were deprived of their property without due process of law. All state courts have held that only the well established adverse possession, presumption of payment theory would bar such a right. (Many cases to this effect are cited under the caption "The Questions Involved are Substantial".)

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This Court Has Jurisdiction to Take This Case

Whether property has been taken without due process of law under the 14th Amendment to the federal constitution depends upon the definition of the words "property" and "taken". This is a judicial question and a question of law. This court has the power to construe the federal constitution and to determine for itself the definition and meaning of "property" and "taken" as used in the federal constitution. It certainly is not bound by a state court decision construing the federal constitution. In the instant case, no questions of fact are involved, therefore, it is a judicial question whether the admitted destruction of access to appellants' property on the two streets and the destruction of sub-sidewalk space belonging to the appellants (as they owned the fee to the middle of the street), by the construction of concrete abutments, and the destruction of the easements of light, air and view, constitutes a "taking" of their "property" without due process under the federal constitution, and without just compensation.

This court has jurisdiction to take this case because:

(1) The question of law is involved as to what constitutes a taking and what constitutes property and whether it has been taken without due process of law under the federal constitution.

(2) This court has jurisdiction to construe the federal constitution and to determine the meaning of the terms and provisions thereof. The Supreme Court of Illinois has construed the 14th Amendment to the United States Constitution to mean that there must be a physical taking or invasion of tangible property to constitute a taking thereunder, when it held that the destruction of appellants'

easements was not a taking of property within the meaning of the due process clause.

(3) The facts being undisputed, the court may examine the whole record in connection with appellants' contention that the 14th Amendment has been violated, to determine whether, from the admitted facts, there is any evidence to substantiate the finding of the Illinois Supreme Court, that no property was taken, and to go to the substance of the facts to determine whether the federal constitution has been violated.

(4) To determine whether the Illinois Supreme Court's finding constitutes such a mixed finding of law and facts, so inseparable from the federal question, that this court can review the whole record to determine if federal rights were violated.

The Supreme Court of Illinois has determined the effect of the admitted facts, under the statutes and constitution of the State of Illinois, in a manner which deprived the appellants of their legal rights under the 14th Amendment to the United States Constitution and has wrongfully denied a federal right set up and claimed in a state court, upon findings that have no basis in the record. In an analogous situation in the case of *Truax* v. *Corrigan*, 257 U. S. 312 (66 L. ed. 259), this court said (pp. 324, 325):

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would

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> be within the power of a state court practically to prevent a review here. * * * Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 593."

These are thoroughly established principles of law. (*Northern P. R. Co.* v. *No. Dakota*, 236 U. S. 585, 593; *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261; *Norfolk Ry.* v. *Conley*, 236 U. S. 605, 609, 610; *Cincinnati* v. *Vester*, 281 U. S. 439, 446; *First Nat'l Bank* v. *Hartford*, 273 U. S. 548, 552.)

The Questions Involved Are Substantial

Inasmuch as the question herein involved affects the validity of the Statute of Limitations of the State of Illinois and the 2nd and 13th Sections of Article II of the Illinois Constitution and practically all states in the Union have similar statutory and constitutional provisions, and the construction and definition of the words "property" and "taking" are involved, which also occurs in the 5th and 14th Amendments to the Federal constitution and in practically all of the constitutions of all of the states, and inasmuch as the opinion of the Illinois Supreme Court may be used as a precedent or wedge by other states, to restrict or limit the constitutional rights of United States citizens, the proper interpretation and application of these statutory and constitutional provisions, and the determination of the meaning of "property" and "taking" is of the utmost importance, and is substantial.

The question of whether the construction and interpretation by the Supreme Court of Illinois, of the words "property" and "taking" has violated the Fourteenth Amendment to the United States Constitution, which is one of the most salient provisions of the Bill of Rights, is substantial.

Affecting this question are the following:

(1) Under universally recognized law (including that of Illinois) easements are property.
(See cases cited under "Law and Argument on Jurisdiction".)

(2) The destruction of an easement constitutes taking of property.
(See cases cited under "Law and Argument on Jurisdiction".)

(3) It is the universal law that where property is *taken*, no regular statute of limitations is applicable, and only the firmly established doctrine of prescription or presumption of payment principle, bars the action.

This is clearly substantiated in Illinois by the case of *People* v. *Rosenfield*, 383 Ill. 468, where the Supreme Court of Illinois sustained a mandamus against the Director of Public Works to compel him to condemn a strip of land which had been used as a public highway without the consent of one of the owners. In that case, the court says (p. 472):

> "Section 13 of Article II of the constitution of this State provides that private property shall not be taken or damaged for public use without just compensation. This provision is self-executing and cannot be annulled by non-action of a head of a department of the State. * * * Unless the owner whose land is wrongfully taken acquiesces in the trespass, taking and use of the property for a public highway for the statutory period of fifteen years, such owner cannot be defeated of his right to compensation. * * * in order that the Department acquire an easement by adverse use, such adverse possession must continue for a period of fifteen years. * * * *Giving the constitution and statute any different construction*

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would annul them. People v. Kingery, 369 Ill. 289." (Italics ours.)

All other states where the question has been raised, hold that only the prescriptive, presumption of payment principle bars an action for the taking of property.

Carter v. *Ridge Turnpike,* 208 Pa. 565, 566;
Faulk v. *Mo. Ry.,* 28 S. D. 1, 9;
Barker v. *St. Louis Co.,* 340 Mo. 986, 999;
Kime v. *Cass County,* 71 Neb. 677, 681;
Board v. *Dancy,* 65 Miss. 335, 341;
Salt Lake v. *Oregon,* 46 Utah 203, 208;
Lewis on Eminent Domain, 3rd Ed., Sec. 966;
Beachwood v. *Farrell,* 20 Pa. D. & C. 285;
Connellsville v. *B. & O.,* 216 Pa. 309;
Gates v. *Colfax,* 177 Ia. 690;
Land v. *Wilmington,* 107 N. C. 72;
Liverman v. *Roanoke,* 109 N. C. 52;
Southern R. R. v. *Jennings,* 130 Tenn. 450;
Schilling v. *Carl Twp.,* 60 N. D. 480;
Lawrence v. *O'Hara,* 48 Ohio St. 343;
Freis v. *Wheeling,* 56 Ohio St. 135;
Mo. R. R. v. *Chapman,* 150 Ark. 334;
Hartley v. *Keokuk Ry.,* 85 Ia. 455.

All of these cases, where the question was presented, hold that the interposition of a shorter period of limitations would be unconstitutional.

(4) It is well established law in all states, including Illinois, that easements cannot be acquired or extinguished except under the prescriptive, presumption of payment theory. In *Brunotte* v. *DeWitt,* 360 Ill. 518, the court says (as to an easement of passage, light and air) (p. 532):

"It can only be extinguished by hostile, adverse, possession for the full statutory period."

In *Swedish Church* v. *Jackson*, 229 Ill. 506, the court says (p. 511):

> "• • • But a complete non-user of an easement for twenty years, with possession in another that is inconsistent with or adverse to the right of such easement, will bar the easement."

Also supporting that rule are the following cases:

I. C. R. R. Co. v. *Moore*, 160 Ill. 9, 15;
Knecken v. *Voltz*, 110 Ill. 264, 271;
Mitchell v. *C. B. & Q.*, 265 Ill. 300, 306;
Lehigh Valley v. *McFarland*, 43 N. J. L. 605, 617, 618, 619.

If an easement cannot be extinguished except by 20 years' adverse possession, then the right to waive the trespass and sue for damage must exist during all of that time.

(5) The decision of the Supreme Court of Illinois in the instant case is inconsistent with established legal principles of all states and is not in conformity with the applicable law of Illinois.

(6) Inasmuch as no 5-year Statute of Limitations is applicable to such "taking", the Illinois Supreme Court adopted the only method available of defeating appellants' action, which was to find that there was no "taking". By so doing, it misinterpreted the Illinois and federal cases, violated established law and principles, and violated the 14th Amendment to the United States Constitution, which prevents the "taking" of *any* property without due process of law.

(7) The 14th Amendment to the United States Constitution, as well as the Illinois Constitution, cast upon the municipality seeking to "take" property, the affirmative

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duty to institute condemnation proceedings. This is established law.

The Right to Compensation for Property Taken Cannot Be Barred By a State

This Court has clearly indicated on many occasions that no state can legislate a citizen out of his property and cannot take his property, regardless of how it is sought to be done, without violating the 14th Amendment. This prohibition applies to the state and all of its agencies, including the state supreme court. If a state, by its courts or legislature, can disregard the mandatory provisions of the federal constitution, which expressly prohibits the taking of property without due process, and if it violates its duty to initiate proceedings when it takes property and then is permitted to apply a short statute of limitations to a suit by the property owner for the taking of his property, it thereby circumvents the provisions of the federal constitution, wrongfully casts the initiative upon the property owner and it thereby nullifies the provisions of the 14th Amendment to the United States Constitution.

In the case of *Chicago, B. and Q. Ry.* v. *City of Chicago*, 166 U. S. 226, the plaintiff in error, the railroad company, also appealed to this court from the Supreme Court of Illinois in a somewhat similar situation and this court said (pp. 235, 236):

> "In determining what is due process of law regard must be had to substance, not to form. * * * But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the 14th Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen.

> • • • Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

The court further quotes with approval from *Scott* v. *Toledo*, 36 Fed. 385, 395, as follows (p. 239):

> "The conclusion of the court on this question is, that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law', and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken would violate the provisions of the Federal Constitution."

The court further cites with approval Cooley on Constitutional Limitations, which says, among other things (p. 240):

> "The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid."

and concluding, says (p. 241):

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the

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> state is a denial by that state of a right secured to the owner by that instrument."

To the same effect is *McCoy* v. *Union Elev.*, 247 U. S. 354, where the court says (pp. 363, 365):

> "We may examine proceedings in state courts for appropriation of private property to public purposes as far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without just compensation, then due process of law was denied him, contrary to the 14th Amendment. * * * The fundamental right guaranteed by the 14th Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation."

In the case of *Brand* v. *Union Elev. Co.*, 238 U. S. 586 (59 L. ed. 1471), a suit was filed for damages on account of obstruction to ingress and egress and light, air and view, due to the construction of an elevated railway. The precise question involved was whether permitting the offsetting of general benefits against damages violated the federal due process clause. The majority opinion held, under plaintiff's theory and his evidence, that the court was precluded from going into that question. A dissenting opinion, joined in by four justices, however held (p. 596):

> "* * * that their property right of ingress and egress was peculiarly and particularly injured by the railroad structure. Such damage was equivalent to a taking of property for a public use, and required just compensation to be made for the injury sustained. * * * This court has more than once held that to take private property for public use without adequate compensation is a deprivation of due process of law within the meaning of the 14th Amendment to the Federal Constitution." (Citing numerous cases.)

Under this rule, the destruction of appellants' accessibility and light, air and view, constituted a taking, and there was no way in which the municipality could avoid paying therefor without violating the 14th Amendment.

Illinois law also requires a condemning body to initiate proceedings where property is taken. In the case of *People* v. *Smith*, 374 Ill. 286, the court says (p. 288):

> "Section 12 of Article 2 of the Illinois Constitution makes absolute the right of a land owner to damages whenever his property is taken or damaged for public use. It makes no difference whether the damages are ascertained before or after the injury is inflicted. (*People* v. Kingery, supra, at page 293) *This is a vested property right.* Ettor v. Tacoma, 228 U. S. 148, 157 L. ed. 773, 779." (Italics ours.)

In *People ex rel.* v. *Rosenfield*, 383 Ill. 468, the court says (p. 472):

> "*The right of the owner to damages because his property is taken or damaged for public use is absolute*, and it makes no difference whether the amount of damages is ascertained before the injury is inflicted or afterwards. *Giving the constitution and statute any different construction would annul them.* People v. Kingery, 369 Ill. 289." (Italics ours.)

In *People* v. *Kelly*, 361 Ill. 54, the court says (p. 58):

> "The appellant might have prevented the changing of the grade of Monroe Street until such time as the damages were actually paid to it had it so elected."

In *Dick Bros.* v. *City of Quincy*, 335 Ill. 368, the court says, (p. 371):

> "Under Section 13 it was the duty of the defendant in error, if private property was to be damaged to have the damages assessed as provided by statute."

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The court further says (p. 372):

> "This constitutional provision is the Supreme law and plaintiff in error had the right to its protection. If defendant in error damaged the property of plaintiff in error *it was the duty of the defendant in error to have the damages ascertained.* If it failed to do so it can not set up such failure as an estoppel against plaintiff in error." (Italics ours.)

In *Moore* v. *Gar Creek*, 266 Ill. 399, the court held (p. 403):

> "It is not necessary for the property owner to take the initiative or make any affirmative move."

In *People* v. *Kingery*, 369 Ill. 289, the court allowed a mandamus to compel the Director of Public Works to initiate condemnation proceeding and overruled the contention of the State that it was not required so to do.

The Illinois Supreme Court predicated its ruling that there was no taking in the instant case, upon former cases in which it affirmed lower courts in their denial of Petitions for Writs of Mandamus to compel the filing of Eminent Domain proceedings, which it says were similar instances. This, it implies, constituted a holding in those cases, that there was no "taking", but only a "damaging" of the property involved.

It erred in this assumption however, as the denial of a Petition for a Writ of Mandamus is not a decision upon the merits. In each of those cases the writ was denied because there was an adequate remedy at law, and to prevent a multiplicity of suits, when damages should be ascertained in a suit at law. The very nature of the remedy permits discretion to deny the writ if there is an adequate remedy at law. (*Hooker* v. *Rooney*, 293 Ill. 370). Courts may refuse the writ if the consequences create confusion or disorder, or will not promote substantial justice, or where it

is unavailing or fruitless and where no beneficial result will follow. (*Jones* v. *Clark*, 355 Ill. 527; *Parrish* v. *Miller*, 336 Ill. 630.)

THIS DECISION IS BUT PART OF AN ERRONEOUS TREND ESTABLISHED AT AN EARLY DATE WHICH HAS LED TO SOME UNUSUAL DECISIONS AND WHICH BECOME PROGRESSIVELY MORE AND MORE DIFFICULT TO CORRECT BY LOCAL COURTS

The decision of the Illinois Supreme Court in the instant case, to the effect that under both Federal and State law there must be an actual and physical invasion of tangible property, to constitute a "taking" and a deprivation of property within the provisions of the due process clause of the federal constitution, is contrary to all rules and principles of substantive law relating to real property. There is no support for it in any of the decisions of this court or in the pronouncements of the courts of other states. The only United States Supreme Court case cited by the Illinois Supreme Court in support of this holding is *Northern Transportation Co.* v. *City of Chicago*, 99 U. S. 635. That case involved only a *temporary interference with accessibility*, and the court on three separate occasions (pp. 639, 642 & 643) emphasized that the decision was predicated upon the temporary nature of the interference. This was clearly pointed out in the case of *United States* v. *Lynah*, 188 U. S. 445, wherein it was held (p. 472) that the only basis for the ruling that there was no "taking" in the Northern Transportation Co. case, was that the interference with access there complained of was merely temporary.

Illinois cases cited by the Illinois Supreme Court in support of its ruling are part of the erroneous trend herein complained of. Many were cases where mandamus had been denied, to compel the filing of eminent domain proceedings, which the Illinois Supreme Court in this case interpreted

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as tantamount to a finding that there was no "taking". Plaintiffs have already shown this was error, because the denial of mandamus is not a decision upon the merits but merely a rule of convenience, where there is an adequate remedy at law.

Under the Illinois Constitution of 1848, the Bill of Rights prohibited only the "taking" of private property without due process of law and without just compensation. In 1870, the present constitution was adopted, which provided (Sec. 13, Art. II) that private property "shall not be taken *or damaged* for public use without just compensation". Thus the present constitution sought to further protect its citizens by adding the words "or damaged". Under the 1848 constitution, the Supreme Court of Illinois had defined what constituted the "taking" of property, in accordance with recognized standards.

In the case of *Nevins* v. *Peoria*, 41 Ill. 592, decided under the 1848 constitution, a city changed the drainage of its streets so that additional water was imposed on the land of the plaintiff and a stagnant pond was formed on adjoining premises not belonging to him. In discussing what constitutes a taking, the court says (p. 511):

> "Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? * * * To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid."

The court recognized that the damage caused by the stagnant pond, *adjoining plaintiff's property but not touching it*, was compensible, and therefore was included within the definition of taking, when it says (p. 515):

> "We know our Constitution was designed to prevent these wrongs. We are of opinion, that, for injuries

> done to the property of the appellant in the case before us • • • by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city of Peoria must respond in damages."

In the case of *T. W. & W. Ry.* v. *Morrison*, 71 Ill. 616, surface waters were diverted by the railway company into ditches, which resulted in a heavier than natural flow upon plaintiff's land. This case cites with approval the *Nevins* case as follows: (p. 619)

> "The constitutional guaranty, that private property shall not be taken or applied to public use without just compensation being made, was held to apply; *and that the owner, to the extent to which he was deprived of the legitimate use of his property should be paid.*" (Italics ours.)

Thus, the case holds that *under the old constitution*, the owner should be paid to the extent that he was deprived of the use of his property. This constituted a holding that such deprivation is a taking, otherwise payment would not have been required, inasmuch as Section 13 of Article II did not then include the words "or damaged".

The leading case in Illinois, which discusses the effect of the inclusion of the word "damage" in the constitution of 1870, is *Rigney* v. *Chicago*, 102 Ill. 64. The court reviews the distinction between taking and damaging and says (p. 74):

> "Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to, and at the time of the adoption of, the present constitution, it was the settled doctrine of this court that any actual physical injury to private property, by reason of the erection, construction or operation of a public improvement in or along a public street or highway, *whereby its appropriate use or enjoy-*

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> *ment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property,* within the meaning of the constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained." (Italics ours.)

The court further says (p. 77):

> "Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution. * * *"

The *Rigney* case is commented on and construed by the United States Supreme Court in *Chicago* v. *Taylor,* 125 U. S. 161, wherein the above quotation, from page 74, is cited with approval.

Under those cases and under the old constitution, which is similar to that of the United States (5th Amendment), the injury to appellants' property in the instant case clearly would have been deemed a taking and would have fallen within the prohibition of the 1848 constitution. But in spite of the liberalization of the constitutional safeguard, by inclusion of the words "or damaged" in the present constitution, the Illinois Supreme Court has held in the instant case that there was no taking and therefore that the five year Statute of Limitations applied.

After this construction of the term "taking", by Illinois courts under the 1848 constitution, which construction was consistent with the rules laid down by this Court and the laws of all other states, Illinois courts deviated or were led astray from this well established principle.

The origin of this erroneous trend appears in some early cases decided under the Illinois Constitution of 1870. These

cases established the erroneous doctrine that the only test of whether there was any recoverable damage under the constitution, was if the value of the premises after the improvement was less than before. This holding is tantamount to permitting benefits of every character to be set off against any or all damage. This entirely ignores the possibility of there being damage due to a "taking", which would be recoverable under the constitution and could not be offset by benefits. The possible result of these holdings was then apparently not evident and not considered important.

It is impossible in this statement to point out and trace the decisions which led to this error.

Some of these early cases so holding, without any consideration of the result or effect, are *Springer* v. *Chicago*, 135 Ill. 552; *Wabash R. R.* v. *McDoughall*, 126 Ill. 111; *Osgood* v. *Chicago*, 154 Ill. 194.

It is obvious that if the property owner suffers damage as a result of the *taking* of property, then paying such damages only by benefits is not "just compensation", and would result in property being taken without due process in violation of the 14th Amendment to the United States Constitution.

In seeking to adhere to principles established by these erroneous early decisions, the Illinois Supreme Court has been led to render opinions which clearly violate a citizen's federal constitutional safeguards and are entirely inconsistent with firmly established doctrines. This has resulted in some strained and unusual rulings, which have been highly favorable to municipalities and condemnors, but very injurious to and discriminatory against its citizens.

In the case of *People* v. *Kelly*, 379 Ill. 297, the plaintiff filed a mandamus suit to compel the City of Chicago to institute condemnation proceedings in connection with its proposed building of a subway. It was conceded that it was necessary for the plaintiff to protect and shore its

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foundation against sub-soil movements at the cost of $225,000.00, otherwise, there would have been serious structural damage and possible collapse of the structure. The Supreme Court of Illinois however, held that there was no taking and denied the plaintiff relief by mandamus, leaving the property owner to his suit at law after the damages occurred and the expenses were paid.

In the case of *People* v. *Rosenfield*, 399 Ill. 247, which was also a petition for mandamus against the Director of Public Works of the State of Illinois, in connection with the construction of a viaduct on a state highway, the change of grade caused surface waters to run into buildings of an abutting property owner. Presumably this was recurrent at every rain, but the court denied that there was a taking of property and refused the mandamus, saying (p. 251):

> "As to whether the alleged damages are such as to amount to a physical taking of property, we note the allegations that surface waters run into the buildings and make them unfit for the uses to which they are now devoted and will damage or destroy valuable equipment, machinery and supplies therein; that it will be necessary to change the floor levels and that because of the materials of which the buildings are constructed the change of floor levels will require large expenditures of money. It is not alleged that these waters accumulate and remain on the premises and thereby prevent the use thereof, but it is claimed that by reason of their running into the buildings the damages are occasioned. Running surface waters are not constantly present but are temporary and come as a result of rain or snow."

The court held that there was no taking of property and mandamus to compel the filing of Eminent Domain proceedings was denied. Under these decisions, the duty of instituting condemnation proceedings was avoided by a finding that there was no taking.

Similarly, in the case of *Kane* v. *City of Chicago*, 384 Ill. 361, which involved the same improvement as the instant case, the plaintiff owned the fee to the center of the street. Illinois cases had theretofore uniformly held that in acquiring an easement to a street for street purposes, the city merely acquired the right to use the street for ordinary street purposes and that the property owner retained right of access and easements of light, air and view. (*Field* v. *Barling*, 149 Ill. 556; *Allen* v. *Chicago*, 176 Ill. 113; *Greenlee* v. *Boren*, 379 Ill. 494.) In the case of *I. B. & W. Ry.* v. *Hartley*, 67 Ill. 439, it was held (p. 444):

> "Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication; it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it was for no other purpose, and if it was condemned, his damages were assessed with no other view."

Nevertheless, in the Kane case, where the city dug caissons in front of plaintiff's property down to bed rock and destroyed plaintiffs' sub-sidewalk usable space, double-decked the street, depressing the lower level and elevating the upper level, placing large supporting columns in the street which seriously affected accessibility, as did the change of grade, the Illinois Supreme Court held that there was no taking.

Again, in the case of *Kane* v. *Chicago*, 392 Ill. 172, when the same case went up to the Supreme Court for a second time, on the question of setting off benefits against the structural damages to the plaintiffs' building and the loss of their easements of access, light and air, the court held (p. 177):

> "Clearly, under the well-established rule that the damage to property not taken is the difference in the

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> fair market value of the property as a whole, before and after the improvement, benefits may always be set off against damages, no matter what may be the amount of those damages. (Osgood *v.* City of Chicago, 154 Ill. 194.) *And as pointed out in the Osgood case, even though the buildings be wholly destroyed, if the value of the lot is increased to an amount exceeding the value of the buildings it cannot be said that the property has been damaged.*" (Italics ours.)

Thus, a municipality might "improve" one out of his property, by seriously damaging or collapsing his building by building a public improvement in the street, and by changing an income producing asset to a tax-paying liability or by compelling the damaged person to advance and expend possibly hundreds of thousands of dollars, which he may not have and may have no means of raising, especially if the property were already mortgaged. The alternative may be the loss of his property or a sacrifice sale and still, under present Illinois cases, this would be held not to be a *taking.*

In none of these cases was a federal constitutional question raised and this court was not called upon to pass upon whether there was a violation of the Fourteenth Amendment.

The final illustration of the trend is the instant case where, in spite of the fact that there is a solid concrete wall in front of the six residences owned by the appellants, who had received no notice of the improvement or summons, and another solid concrete retaining wall on the side thereof, with the street depressed and an overhead viaduct, thereby practically destroying accessibility and the easements of light, air and view, and perpetually darkening the premises and making them uninhabitable, the court held there was no taking and that the 5-year period of limitations applied.

Plaintiffs under this caption merely desire to illustrate how an original erroneous decision or a misconstruction seemingly unimportant may lead, step by step, to the establishment of erroneous principles of law which become more firmly rooted in the state's jurisprudence and become more and more difficult to control or correct, until finally, resort must be had to the Supreme Court of the United States to aid the state court and guide it back to constitutional channels. This accentuates the importance of the instant case and is designed to illustrate that the questions involved are substantial.

STAGE IN PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS WERE RAISED

The federal question was initially raised in the trial court when the defendant filed its motion to dismiss the suit (Rec. 4; p. 7) on the theory that the action was barred by the five-year limitation period and the plaintiffs immediately filed their objections in writing thereto setting up amongst other things as follows (Rec. 4; pp. 9, 10):

> "That depriving plaintiffs of their easements in their property of light, air, view, accessibility, etc., constituted the taking of property or the taking of a vested property right. * * * Article 2, Section 2 and Article 2, Section 13 of the Illinois Constitution and the said Eminent Domain Act and the Statute of Limitations of the State of Illinois, *which permitted or permit the taking of said property of plaintiffs without just compensation and without due process and without any legal action, violate Section 1 of the Fourteenth Amendment to the United States Constitution* in depriving plaintiffs of property without due process of law and each of said sections and said Statutes are unconstitutional and void."

The question was also raised in Paragraph 17 of appellants' complaint which alleged (Rec. 4; p. 11) that said

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"taking" was *"in violation of * * * the first section of the 14th Amendment to the United States Constitution."*

The final judgment of the lower court was entered April 27, 1948, which found that there was no physical taking of any of plaintiffs' tangible property and expressly found as follows (Rec. 4; p. 11):

> "(3) That the application of said Section 15 of the Statute of Limitations to the action herein * * * does not deprive plaintiffs herein of due process of law, as guaranteed under Section 2, Article II of the Illinois Constitution or the first section of the Fourteenth Amendment to the United State Constitution."

In the appeal to the Supreme Court of the State of Illinois, the plaintiffs in their assignment of errors (Rec. 6; p. 8) claimed as follows:

> "* * * that the trial court erred in failing to find that there was a taking of plaintiffs' property, under the Illinois statutes and Constitution, and the United States Constitution; in finding that * * * the application of Section 15 did not violate any state or federal constitutional provisions."

Plaintiffs likewise set this up in detail (and argued it) under their Point II of their original brief (R. 6; p. 11). The opinion of the Supreme Court of Illinois (R. 17) also expressly found that plaintiffs' property had not been taken and that there was no violation of any State or Federal constitutional provisions (R. 17).

Plaintiffs again fully raised the Federal constitutional question in their Petition for Rehearing (R. 20; p. 18) which was denied.

Conclusion

Thus plaintiffs asserted and insisted upon their rights and upon the protection of the Fourteenth Amendment to

the Federal Constitution at every step. Plaintiffs have insisted and argued that under the decisions of the United States Supreme Court, and under all standards of law and all definitions, that easements of light, air and access are property and that their destruction constitutes the taking of property. Cases of all other states so hold. It is a standard and uniform definition and principle of common and statutory law. The Supreme Court of Illinois cannot be permitted to say that such easements are not property and that they were not taken.

Plaintiffs urge that it is inequitable and unfair and in violation of established principles to bar their cause of action by the short period of limitations. This is especially true where property owners are non-residents and may have no actual notice of the construction. It is also true because in most instances, the property owners who are not served with any notice or process, are not conscious of or familiar with, their possible rights of action and five years may readily expire during construction and during the details of final completion before their rights are called to their attention.

Plaintiffs pray that this court take jurisdiction and examine the judgment of the Supreme Court of Illinois, to determine whether the sacred provisions of the Fourteenth Amendment have been violated.

Presented this 2nd day of November, 1949.

Respectfully submitted,

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Counsel for Appellants.

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APPENDIX "A"

Docket No. 30880—Agenda 13—March, 1949.

BETTY STODDARD HORN ET AL., Appellants,

v.

THE CITY OF CHICAGO, Appellee.

Mr. Justice Thompson delivered the opinion of the court:

This suit was filed by plaintiffs, appellants here, in the circuit court of Cook County to recover damages arising out of the construction of the Wabash Avenue viaduct in the city of Chicago. The complaint, as amended, charged injury to plaintiffs' abutting property and it was contended that the construction of said improvement constituted the taking and damaging of their property without payment of just compensation, and without due process of law, contrary to the provisions of both Federal and State constitutions. Defendant filed a motion to dismiss and urged in bar of the action that it did not accrue to plaintiffs within the time limited by law to institute the proceedings, and the motion was supported by affidavit to that effect. The motion was allowed and the cause dismissed from which an appeal was taken to this court.

Appellants' property is located at the northeast corner of East Illinois Street and North Wabash Avenue, in Chicago, and has a frontage of 100 feet on Illinois Street on the south, 100 feet on Wabash Avenue on the west and 100 feet on an alley on the north. Illinois Street is the third street north of the bridge and the first street south of Grand Avenue, where the approach to the bridge begins. The damage to appellants' real estate, as claimed, was brought about by the construction of the north viaduct on approach to the bridge over the Chicago river at Wabash Avenue in the city of Chicago.

The amended complaint alleged, in substance, that appellants' property was improved with six two-story brick residences, fronting on Wabash Avenue and abutting on private property in the rear; that said buildings were

built and adapted to the then established grades of the said streets and alleys; that prior to the construction of the Wabash Avenue bridge and viaduct there was convenient and easy access to appellants' property and that the same was indispensible to the use and occupancy thereof. The amended complaint also alleged that appellants owned the title, in fee, to the streets and alley adjoining their property to the center of the highway, subject only to an easement in the city of Chicago for surface highway purposes; that in building the Wabash Avenue bridge and the north approach thereto, the city changed the grade of the streets, sidewalks and alley adjacent to appellants' property and constructed a retaining wall along Illinois Street and Wabash Avenue, separating appellants' property from the sidewalk space adjoining their property; that such construction interfered with and destroyed appellants' easements of light and air, and of ingress and egress to and from the premises in question; and that appellants were thereby deprived of their property without just compensation.

The city filed a motion to dismiss on the ground that the action was barred by the Statute of Limitations. Affidavits in support of the motion were filed, stating that the construction of the bridge and viaduct was completed and the streets were opened to public traffic more than five years prior to the commencement of the present action. Appellants, in their objection filed to the motion to dismiss contended (1) that no Statute of Limitations can run against the cause of action here sued on, since the same arises under the constitutional provision that private property shall not be taken or damaged for public use without just compensation, and any statute restricting the time to file suit under this constitutional provision would be invalid; (2) that section 2 of the Eminent Domain Act, providing that no private property shall be taken or damaged for public use until an attempt has been made by the body authorized to condemn, to agree upon damages, places the burden of ascertaining damages upon the condemner and no Statute of Limitations could run until this was done; (3) that depriving appellants of their easements of light, air,

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view, accessibility, etc., constituted the taking of property or the taking of a vested property right, and any Statute of Limitations taking away this property or property rights deprives appellants of their property without due process of law and just compensation, and violates section 2 of article II and section 13 of article II of the Illinois constitution, and section I of the fourteenth amendment to the Federal constitution; (4) that the city, not having complied with the constitutional and statutory provisions requiring it to initiate proceedings, is estopped to invoke any Statute of Limitations claimed to be applicable; (5) that if there is any limitation upon appellants in bringing their action, it would be only after the expiration of twenty years from the completion of the improvement under the principle and theory of adverse possession and by prescription; (6) that if any statute of limitations is applicable, then it is the ten-year statute provided for in section 17 of the Limitations Act, as the constitution is a writing which would bring the cause of action under that section.

The court's order in dismissing plaintiffs' suit on the city's motion is based upon findings that there had been no physical taking of any of appellants' tangible property for any public use, that the action was barred by the provisions of section 15 of the Limitations Act because not brought within five years after the completion of the improvement in question, and that the application of section 15 of the Limitations Act (Ill. Rev. Stat. 1947, chap. 83, par. 16,) does not violate the provisions of section 13 of article II of the State constitution, providing that private property shall not be taken or damaged for public use without the payment of just compensation, and does not deprive appellants of due process of law, as guaranteed by section 2 of article II of the State constitution and the first section of the fourteenth amendment to the Federal constitution.

The contentions which appellants make in this court are the same as those made in their objections to the motion to dismiss, and present the question whether appellants' asserted right to compensation for damages to their

property is barred by the five-year Statute of Limitations.

It is established by the pleadings that appellants, as abutting owners, are seized of title and fee to the center of the street, that the city had legal authority to make the improvement in the street, that it was properly made in pursuance of such authority, and that it is a permanent structure, the existence of which is necessarily injurious to appellants' property. Appellants do not allege that there has been any negligence or unlawful acts on the part of the city in the construction of the improvement, or that as a result of its construction there has been any physical invasion of their tangible property adjacent to the street, but they allege an injury to such property from the destruction of its appurtenant easements of light and air, and of ingress and egress. They also allege an injury occasioned by the filling in of sub-sidewalk space, which injuries, they claim, constitute a taking of their property for public use.

The test applied by this court and also by the Federal court, in determining whether real estate has been taken for public use within the meaning of our constitution, is whether there has been an actual physical invasion of the tangible property. (People ex rel. Pratt v. Rosenfield, 399 Ill. 247; Kane v. City of Chicago, 392 Ill. 172; People ex rel. Tyson v. Kelly, 379 Ill. 297; Cuneo v. City of Chicago, 379 Ill. 488; Barnard v. City of Chicago, 270 Ill. 27; Otis Elevator Co. v. City of Chicago, 263 Ill. 419; Schroeder v. City of Joliet, 189 Ill. 48; Northern Transportation Co. v. City of Chicago, 99 U. S. 635.) As pointed out in these cases, even though there has been no attempt by the sovereign authority to appropriate and use the real estate for public purposes, nevertheless, if as a necessary result of the construction, maintenance or operation of a public improvement, the real estate is physically invaded by superinduced additions of water, earth, sand or other materials, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution.

Before the adoption of our present constitution a landowner could have no relief for damages occasioned by the construction or maintenance of a public improvement in a proper manner under lawful authority, although his prop-

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erty was thereby rendered practically valueless, unless there had been an actual physical invasion of the land itself. Thus, a property owner was guaranteed compensation for any deprivation of res, but not of jus. This situation continued until 1870, when the framers of our present constitution added the provision that private property should not be damaged for public use without just compensation. It is under this last constitutional provision, and none other, that a landowner may claim compensation for the destruction or disturbance of easements of light and air, and of accessibility, or of such other intangible rights as he enjoys in connection with, and as incidental to, the ownership of the land itself.

Appellants contend that inasmuch as they own the fee to the center of the street, consequently the filling in of the sidewalk space in the streets adjacent to their property amounted to a taking of their private property for public use. It is admitted that appellants' ownership of the fee is subject to an easement in favor of the public for street purposes. The easement for a street includes such use of the land at or beneath the surface as will make the easement effective, and for that purpose the public authorities may change the grade of the street and the owner of the fee has no right to interfere. (City of Dixon v. Sinow & Weinman, 350 Ill. 634.) Where the owners of abutting lots own the fee in the street the city may use such streets, including the sidewalk space, for all purposes to which a street may be put without the consent of the abutting owners. (Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192.) The title of the abutting owner to the center of the street is a present subsisting ownership of the fee which he may subject to any private use he sees fit so long as it does not interfere with public travel. (Davis v. City of Chicago, 333 Ill. 422.) The owner of the fee, whether it be the city or the abutting owner, may use the sidewalk space for any private purpose and in any manner such owner may desire, provided such space is not required to advance the effectiveness of the public easement. (Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192.) The appropriation of sidewalk space in the construction of a street improvement does not impose additional servitude on

the fee and does not amount to a taking of the fee owner's property. It is not a subjection of the fee to a new and additional burden or easement, but is merely the exercise or continuation of the burden or easement to which it was already subject. Hence, such an appropriation of sidewalk space does not come within the constitutional prohibition that private property shall not be taken or damaged for public use without just compensation.

Appellants cite the case of Davis v. City of Chicago, 333 Ill. 422, and Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, in support of the theory that the destruction of their sidewalk space constituted a taking of their property. The Davis case was an injunction suit by a property owner, who owned the fee in the adjacent street, to restrain the city from ejecting him from his occupancy and use of the sidewalk space and appropriate such space for the construction of a local improvement under the authority of special assessment proceedings which the city had instituted in the county court. This court held that the property owner was entitled to an injunction during the pendency of the appeal which he had taken from the judgment of the county court in the special assessment proceedings. The holding was based upon the fact that the same questions were involved in the pending appeal as in the injunction suit. It is apparent that this case can have no application to the question at issue here. The Pennsylvania case held that a statute forbidding the mining of coal in such a way as to cause subsidence of any structure used for human habitation could not be enforced where to do so would destroy previously existing rights of property and contract. This decision, also, could have no application to the case at bar.

We have repeatedly held that an abutting property owner is not entitled to have condemnation proceedings instituted to determine damages to his property occasioned by a public improvement where no part of his property is physically taken and that the city or other authorized sovereign constructing such improvement is not required, under the constitution or the Eminent Domain Act or any other law or Statute, to institute condemnation or other proceedings to ascertain such damages. (People ex rel. Pratt v.

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Rosenfield, 399 Ill. 247; People ex rel. Tyson v. Kelly, 379 Ill. 297; County of Mercer v. Wolff, 237 Ill. 74.) Cases relied on by appellants do not support their contention that it was the duty of the city to initiate proceedings to determine their damage. City of Elgin v. Eaton, 83 Ill. 535, was a case arising before the passage of our present Eminent Domain Act and at a time when the Eminent Domain statute then in effect made it the duty of the city to have damages ascertained.

Appellant cites the case of Bradbury v. Vandalia Levee and Drainage Dist. 236 Ill. 36, and quotes from this case at page 44, "If a drainage district actually takes land, compensation must be made before the land is appropriated, and if the district concedes that damage will result to lands such damages may be assessed under the law of eminent domain; but if the district does not concede, in the first instance, that damage will result, an action on the case is an appropriate remedy to determine the question whether lands will be damaged and to recover the damages." We are not of the opinion that this court intended, by the use of the above-quoted language, to hold that a district was obligated or required to ascertain consequential damages. This would appear from the use of the word "must" in regard to compensation for land actually taken and the use of the word "may" in reference to damages. This conclusion is also strengthened by the fact that in the later case of Bay Bottoms Drainage Dist. v. Cache River Drainage Dist. 295 Ill. 301, after quoting with approval the above language in the Bradbury case, immediately followed the same with the statement, "Where no part of the premises of complainant is sought to be taken and no direct physical damage to his property is contemplated and the damages to be sustained, if any, are entirely consequential, the complainant is not entitled to have the damages ascertained under the Eminent Domain Act but he is remitted to his action at law."

The case of Moore v. Gar Creek Drainage Dist., 266 Ill. 399, cited by appellants, held only that a grant obtained from the highway commissioner for a right of way to lay the title in a public highway for the benefit of a drainage district was ineffective in view of the fact that the com-

missioners had no authority to grant such right of way or permit the use of the street for other than highway purposes.

The case of Dick & Bros. Quincy Brewing Co. v. City of Quincy, 335 Ill. 368, held that as section 13 of the Local Improvement Act expressly provided that when private property was to be taken or damaged, the city should designate some officer to file a petition in some court of record in the county in the name of the municipality praying that steps be taken to determine the amount of such compensation. Therefore, an owner of the property which had been assessed for benefits in a proceeding under the Local Improvement Act was not estopped from subsequently suing for damages to his property by his failure to file objections to his assessment, or a cross petition claiming damages in the special assessment proceeding. Section 13 of the Local Improvement Act then applied, as it does now, (Ill. Rev. Stat. 1947, chap. 24, par. 84-13,) only to local improvements to be paid for wholly or in part by special assessment or by special taxation. It does not appear from the pleading or the record in the instant case that the public improvement here in question was constructed under the provisions of the Local Improvement Act, or that it was to be or was paid for, wholly or in part, by special assessment or by special taxation. This decision is, therefore, insufficient to warrant this court in holding that it was the duty of the city in connection with its construction of the Wabash Avenue bridge and approaches thereto to ascertain damages to the property of appellants. Three cases cited by appellants, People ex rel. Markgraff v. Rosenfield, 383 Ill. 468, People ex rel. First Nat. Bank v. Kingery, 369 Ill. 289, and People ex rel. O'Meara v. Smith, 374 Ill. 286, were cases where a mandamus was awarded in favor of a property owner to compel the institution of eminent domain proceedings. The relator in the first of these cases was the owner of land over which a State highway had been constructed and for that reason was entitled to the writ. In the other two cases the writ was allowed because a suit for damages could not be maintained against the director of the Department of Public Works and Buildings and there was no other party against whom damages could be recovered. These cases are not

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authority for the rule contended for and are without application to the instant case.

This court has held in a number of cases that eminent domain proceedings are not required to ascertain consequential damages. (People ex rel. Pratt v. Rosenfield, 399 Ill. 247; County of Mercer v. Wolff, 237 Ill. 74.) We have also settled the proposition that a property owner suffering such damages is deprived of no constitutional right in being remitted to an action at law for the recovery of his damage. People ex rel. Pratt v. Rosenfield, 399 Ill. 247; Illinois Power and Light Corp. v. Peterson, 322 Ill. 342.

It is contended by appellants that, as the right of action arises under the constitutional provision that private property shall not be damaged for public use without just compensation, no statute of limitation can run against it. They insist this constitutional guarantee would be rendered nugatory by legislative enactment and the property rights secured thereby would be dependent upon the mere will of the General Assembly. We do not find any support in this respect from the many cases which diligent counsel have cited in support thereof, either expressly or by inference or implication. We hardly think it reasonable that the framers of our constitution intended that one given a right of action for damages under the constitutional provision might delay his suit for many years when evidence, formerly within his power to produce, concerning the existence, cause and extent of the alleged damage, may have become lost, destroyed or otherwise beyond the defendant's power or control. The purpose of a statute of limitation is to require any necessary litigation to be brought within such time as the particular facts and circumstances may be proved with the utmost certainty and before adequate proof has become stale or entirely lost. (Leitch v. New York Central Railroad Co. 388 Ill. 236.) The legislature may, without violating constitutional guaranties, enact statutes which limit the time within which actions may be brought to enforce demands where there was previously no period of limitation, or which limit, change, and vary existing rules as to limitation of actions, either by shortening or extending the

time within which the cause of action may be asserted. (34 Am. Jur. 27, Par. 18.) Even a substantive right created by a State constitution is governed and controlled in its enforcement and administration by regulatory and procedural legislation enacted by the General Assembly, which legislative enactments may include a limitation as to the period within which action may be taken to enforce the substantive right. (State ex rel. Hammon v. Industrial Com. 144 Ohio State 477, 59 N. E. 2d 745; Burrill v. Locomobile Co., 258 U. S. 34, 42 S. Ct. 256.) We think it clear that the framers of the constitution did not intend that the rights given to damaged property owners under section 13 of article II should have unlimited time for their enforcement.

We do not think it necessary to burden this opinion further with an analysis of the alternative contention that, by analogy to the statute permitting actions for the recovery of real estate to be brought at any time before there had been twenty years' adverse possession, the cause of action here may be brought at any time within twenty years from the date it accrued, since, as hereinabove pointed out, appellants' property has not been taken by the city. Neither are we of the opinion that appellants' case is aided by section 16 of the Limitations Act, which pertains to "written contracts."

We are of the opinion, from an analysis of the many cases, that a cause of action such as appellants have sued on here, must be commenced under section 15 of the Limitations Act, (Ill. Rev. Stat. 1947, chap. 83, par. 16,) providing that actions to recover damages for any injury done to real property shall be commenced within five years next after the cause of action accrues, and that this violates no constitutional right and harmonizes with recognized principles of law.

In accordance with the views herein expressed, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

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